UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

CARL R. LALIBERTE, Petitioner v. UNITED STATES OF AMERICA, Respondent	Criminal No. 92-21-P-C Civil No. 95-98-P-C

GENE CARTER, Chief Judge

MEMORANDUM AND ORDER DISMISSING PETITIONER'S MOTION FOR RELIEF PURSUANT TO 28 U.S.C. § 2255

Petitioner Carl Laliberte, who is currently serving a sixty-month sentence for conspiracy to possess with intent to distribute four and one half (4.5) kilograms of cocaine, submits to this Court a Motion to Vacate, Set Aside, or Correct Sentence Pursuant to 28 U.S.C. § 2255 (Docket No. 70)("Section 2255 Motion"). This Court ordered the United States Attorney to file an answer thereto (Docket No. 72). Accordingly, the Government filed its Opposition to Motion to Vacate, Set Aside, or Correct Sentence (Docket No. 75)("Opposition"). Petitioner, in turn, submitted a letter in reply (Docket No. 76)("Reply"). After careful review of the record, this Court will dismiss Petitioner's Section 2255 Motion for the following reasons.

I. STANDARD OF REVIEW

The Court of Appeals for the First Circuit has consistently held that:

> a [section 2255] petition can be dismissed without a hearing if the petitioner's allegations, accepted as true, would not entitle the petitioner to relief, or if the allegations cannot be accepted as true because they are contradicted by the record, inherently incredible, or conclusions rather than statements of fact.

United States v. Rodriguez Rodriguez, 929 F.2d 747, 749-50 (1st Cir. 1991)(citations and internal quotations omitted). This Court, therefore, bases its decision on the facts contained in the record and on Petitioner's factual allegations that are credible, nonconclusory, and consistent with the record.

II. FACTS AND PROCEDURAL HISTORY

On February 18, 1992, Carl Laliberte was arrested on a warrant issued after the return of an indictment charging him with five counts of criminal activity involving cocaine[1] (Docket No. 1). Though Laliberte pleaded not guilty at his arraignment, he later appeared before this Court with his attorney, J. Mitchell Flick, and entered pleas of guilty to Counts I and V of the indictment pursuant to an Agreement to Plead Guilty and Cooperate (Docket No. 18)("Plea Agreement"). Transcript of Rule

[1]Count I charged Petitioner with conspiracy to possess with intent to distribute cocaine, 21 U.S.C. §§ 841(a)(1), 846. Counts II, III, and IV charged Petitioner with possession with intent to distribute cocaine, 21 U.S.C. § 841(a)(1). Count V charged Petitioner with using real property to commit the above violations, subjecting that property to criminal forfeiture, 21 U.S.C. § 853.

11 Proceedings, Apr. 27, 1992, at 2-3 ("Rule 11 Proceedings"). The Plea Agreement provided for: the Government's dropping Counts II, III, and IV of the indictment; Laliberte's cooperating under immunity; and the Government's bringing his cooperation to the attention of the sentencing court at Laliberte's request. See Plea Agreement ¶ 1, 3, 9. That agreement, however, expressly provided that the Government had no obligation to move for downward departure at sentencing. Plea Agreement ¶ 11.

Soon thereafter, Laliberte began cooperating with the Government in its law enforcement efforts, which yielded at least one arrest, one forfeiture, and the recovery of significant quantities of marijuana. See Transcript of Presentence Conference and Sentencing Proceedings, July 1 & 6, 1993, at 17-25. In May of 1992, however, this Court suspended Laliberte's cooperation upon discovering that the Government had actively involved Laliberte in law enforcement without the knowledge or consent of the United States Probation Office, the Pretrial Services Officer, or this Court. See Order Directing Termination of All Active Law Enforcement Cooperation of Defendant (Docket No. 19). Laliberte's permission to cooperate was restored three months later. See Motion to Permit Active Cooperation (Docket No. 22).

Notwithstanding the plain language of the Plea Agreement clearly stating that the Government was under no obligation whatsoever to seek any downward departure in Laliberte's sentence, even if he spent every, single day between his plea and

his sentencing in full, active cooperation with the Government, Laliberte felt that the three-month hiatus in his active cooperation deprived him of the core benefit of his bargain. Plea Agreement ¶ 11; Transcript of Presentence Conference, Sept. 24 & 29, 1992, at 30-31.

For that reason, Laliberte moved to withdraw his guilty plea (Docket No. 30). This Court denied that motion (Docket No. 45) and was upheld on appeal. United States v. Laliberte, 25 F.3d 10 (1st Cir. 1994). At sentencing, the Government moved both to dismiss Counts II, III, and IV of the indictment (because it was bound to do so) and for a downward departure (although it was free to do otherwise). This Court granted both Government motions, departing downward fully eighteen months from the low end of the applicable Sentencing Guideline range, more than three years below the maximum sentence this Court could lawfully have imposed. Judgment (Docket No. 50) at 1, 2, 5. This Court also waived the minimum $12,500 fine that Laliberte's offense presumptively carries because he would be unable to pay it. Judgment at 5. This Court did find, however, that Laliberte could afford to reimburse the Government for the $2,392 in attorney's fees that Flick charged to the Government as appointed counsel before Laliberte retained other counsel. Memorandum of Sentencing Judgment (Docket No. 49) at 4. As a condition of his four-year period of supervised release, then, Laliberte must repay that amount in a monthly installment plan. Judgment at 3.

Laliberte remains unsatisfied. Laliberte has since submitted to this Court a letter Motion for Reconsideration of Sentence (Docket No. 68). The Government responded by filing its Opposition to Request for Sentence Reduction (Docket No. 69). Laliberte's motion was denied by endorsement. Soon thereafter, Laliberte filed the current Section 2255 Motion, which was followed closely by Government's Opposition and Laliberte's Reply.

III. DISCUSSION

Petitioner Laliberte's Section 2255 Motion advances three primary claims.[2] First, Petitioner contends that the Sixth Amendment entitles him to counsel for the present petition.[3] Second, Petitioner argues that his Sixth Amendment right to effective assistance of counsel was violated by Flick's conduct in the course of negotiating the Plea Agreement. Third, Petitioner challenges as excessive that part of his sentence

[2]In its Opposition, the Government discerns in Petitioner's Section 2255 Motion a fourth claim, that he seeks relief on the basis of his "Conquest of Substance Abuse." Opposition at 23. In his Reply, Petitioner disavows this claim, noting that he "simply put [his] drug abuse treatment papers in [his] memorandum as a proud achievement to show your honor, not justification for the problems that occurred in [his] case, . . ." Reply at 3. Consequently, this Court will not address any such claim as a part of Petitioner's motion.

[3]Petitioner's initial request for counsel to assist him in filing a section 2255 petition came in his letter Motion for Reconsideration of Sentence (Docket No. 68). Although this Court denied that request in denying all motions contained in Petitioner's letter, Petitioner has continued to press the issue as if it were not yet decided.

requiring him to reimburse the Court for $2,392 in counsel fees. Each claim is considered in turn.

A. RIGHT TO COUNSEL IN THIS PROCEEDING

The Court of Appeals for the First Circuit has recently enumerated the three necessary characteristics of "the rare section 2255 case in which the appointment of counsel is warranted.":

> (1) [petitioner] has shown a fair likelihood of success on the constitutional claim, (2) that claim is factually complex and legally intricate, and (3) the facts are largely undeveloped and [petitioner] (who is both incarcerated and indigent) is severely hampered in his ability to investigate them.

United States v. Mala, 7 F.3d 1058, 1063-64 (1st Cir. 1993). Petitioner's case meets none of these requirements. First, as will be demonstrated below, see infra III.B., Petitioner does not show a fair likelihood of success on his constitutional claim. Second, though Petitioner's claim does present some legal intricacy, it is factually straightforward. Third, no relevant facts remain to be developed, so there is no need for further investigation by another who is not hampered by incarceration or indigence. Therefore, Petitioner is not entitled to appointed counsel for this proceeding.

B. INEFFECTIVE ASSISTANCE OF COUNSEL

Laliberte attacks the constitutional adequacy of the counsel he received in the course of negotiating the Plea Agreement. The

Supreme Court has articulated a two-part test for assessing whether counsel's representation was so ineffective as to constitute a Sixth Amendment violation. Strickland v. Washington, 466 U.S. 668 (1984). First, a claimant must demonstrate that "counsel's representation fell below an objective standard of reasonableness," outside "'the range of competence demanded of attorneys in criminal cases.'" Id. at 687-88. In addition, claimant must show "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694.

In this case, Petitioner fails to demonstrate that Flick's representation fell below an objective standard of reasonableness. Petitioner supports his ineffective assistance claim merely with the conclusory assertion that Flick "failed to investigate [his] plea agreement and Law pertinent thereto." Section 2255 Motion at 8.

Close examination of the record of proceedings relating to the Plea Agreement, however, indicates that Flick's performance not only demonstrated his knowledge of the Plea Agreement and of relevant law, but achieved a relatively favorable result for his client. On the record before this Court, Flick represented, and Laliberte confirmed, that Flick had reviewed the plea agreement himself, and had fully explained its contents and legal consequences to Laliberte in a way Laliberte understood. Rule 11 Proceedings at 15-23. In addition, the Plea Agreement itself testifies to Flick's competence in that it provides for the

dismissal of three of the five counts then pending against Laliberte, and for the opportunity to have his required cooperation brought to the attention of the sentencing court. See Plea Agreement. Therefore, Laliberte's ineffective assistance claim fails.[4]

C. EXCESSIVE SENTENCE

Petitioner claims that the condition of his supervised release requiring him to reimburse the Government $2,392 for appointed counsel fees constitutes an excessive sentence. A nonconstitutional, nonjurisdictional issue that was not, but could have been, raised on appeal may not be raised on collateral attack except under two very limited circumstances: (1) where a "miscarriage of justice" will result, Knight v. United States, 37 F.3d 769, 772-73 (1st Cir. 1994); or (2) where failure to raise the issue on appeal was the result of ineffective assistance of counsel, Lopez-Torres v. United States, 876 F.2d 4, 5 (1st Cir. 1989).

In this case, Petitioner's claim that the $2,392 reimbursement of costs rendered his sentence excessive raises neither constitutional nor jurisdictional concerns. See Knight, 37 F.3d at 772. Moreover, Petitioner did, in fact, directly

[4]Because Flick represented Petitioner with reasonable competence, this Court cannot coherently reach the second prong of the Strickland test, the question of whether reasonable representation would have yielded a different result. See Strickland, 466 U.S. at 700.

appeal his case and could have raised the issue of his fine then, but did not. See Laliberte, 25 F.3d at 13. Therefore, the Court may consider the issue on collateral attack only if failure to do so will result in a "miscarriage of justice," or if the issue was not raised on appeal because Petitioner's counsel was ineffective. Neither is the case here. First, a fee of $2,392 to be paid over four years by an able-bodied man of 37 years (upon his release in 1998) cannot reasonably be characterized as a "miscarriage of justice." Second, nothing in the record or in Petitioner's allegations supports the claim that Petitioner's counsel on appeal was anything but adequate. Nothing undermines the presumption that counsel's decision not to appeal the issue of fee reimbursement was well within the range of legitimate, professional judgment. Consequently, Petitioner's excessive sentence claim fails.

IV. CONCLUSION

Accordingly, it is ORDERED that Petitioner's Motion to Vacate, Set Aside, or Correct Sentence be, and it is hereby, DISMISSED.

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GENE CARTER
Chief Judge

Dated at Portland, Maine this 2d day of February, 1996.